PUBLIC PROSECUTOR

v.

KOH PUAY KHOON & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CRIMINAL TRIAL NO. 4 OF 1979]
5 OCTOBER 1983

CRIMINAL LAW: *Murder - Causing death in furtherance of a common intention - Ground for postponement of a case - Accused persons and their right to be defended by Counsel of their choice - Probation reports - Guilty plea - Whether a mitigating factor - Penal code ss. 302, 304.*

The four accused, aged between sixteen years and one month and twenty-one years and six months on the date of the incident, were charged in the Johore Bahru High Court on 2 April 1983 on an amended charge of causing the death of a youth under s. 304 of the Penal Code in furtherance of a common intention on 10 September 1977. All four accused were arrested on different occasions and from the date of their arrest to the date of their trial in the High Court on 2 April 1983, there had been numerous appearances in Court and postponements in connection with the Preliminary Inquiry.

Portions of probation reports obtained in respect of all four accused were disputed which accordingly made it incumbent upon the Court to inquire into what was properly the subject matter of a probation report.

The 1st, 2nd and 4th accused pleaded guilty to the amended charge. The 3rd accused who claimed trial initially, also pleaded guilty.

Held:
Taking into consideration each of the accused's degree of participation and the surrounding circumstances, all four accused were sentenced to imprisonment varying between 5 and 7 years to commence from the date of arrest.

Cases referred to:
Tukiran v. Public Prosecutor [1955] MLJ 24
Teh Yew Whatt v. Public Prosecutor [1958] MLJ 171
Maureen Perle Van Pelz [1942] 19 CAR 10
Albert Bright [1916] 12 CAR 69
Choo Wai Sung v. Public Prosecutor [1946] MLJ 119
Sau Soo Kim v. Public Prosecutor [1975] 2 MLJ 134
Malvani v. Public Prosecutor [1971] 1 MLJ 137
Public Prosecutor v. Teh Ah Cheng [1976] 2 MLJ 186
Public Prosecutor v. Chung Kwong Huah [1981] 1 MLJ 316
Lim Yoon Fah v. PP [1971] 1 MLJ 37

Legislation referred to:
Penal Code, ss. 302, 304

Other sources referred to:
Archbold's Criminal Pleading Evidence & Practice, 36th Edn., para. 613 & 614

For the prosecution - Ahmad Hj. Maarop; DPP
For the 1st accused - Karpal Singh; M/s. Karpal Singh & Co.
For the 2nd and 4th accused - Elyas Majeed; M/s. Elyas Majeed & Co.
For the 3rd accused - Subra Naicker; M/s. Subra Naicker & Co.

JUDGMENT

Mahadev Shankar J:

On 10 September 1977 Chew Peng Tee (hereafter referred to as the deceased) went to the Central Market. Jalan Ah Fook, Johore Bahru. He was then in the spring-time of his life, being barely 20 years old. He was accompanied by his girlfriend one Voon Kin Thai.

The object of the visit was to collect some goods from a friend of his named Ah Pow.

As the goods were being loaded into the boot of the car the deceased was set upon by a gang of youths said to number more than 10.

This gang mercilessly attacked the deceased and at the post-mortem it was found that amongst other injuries he had 4 major punctured wounds, one below the left nipple, one below the right nipple, one at the left lumbar region and one on the right hip.

The internal findings disclosed that the heart had been punctured and the left lung had also been punctured.

Soon after arrival at the hospital he died of these wounds.

Before his death the deceased named a number of persons involved in the attack against him.

The police moved with commendable speed. On 11 September 1977 they arrested the 1st accused Koh Puay Khoon. On the date of the incident he was 16 years 10 months old.

The 2nd accused, Tay Tiam Hock, was arrested on 7 January 1978, On the date of the incident he was 21 years old.

Both of them were taken into custody after their arrest and they have remained in custody ever since.

Shortly after their arrests the 1st and 2nd accused were brought before the Magistrate Court for Preliminary Inquiry to be conducted in order to determine whether there was evidence to commit the accused for trial on a charge of murder under s. 302 of the Penal Code.

The record discloses that the Preliminary Inquiry did not get underway until 12 August 1978. By that date the 1st and 2nd accused had been produced in Court no less than 11 times. On many of these occasions the Preliminary Inquiry was postponed because one defence Counsel was engaged elsewhere.

Between 12 August 1978 and 19 May 1979 both accused were produced in Court again on no less than 12 times. The inquiry proceeded on some of those dates. On other dates there were further postponements for a variety of reasons.

Finally on 19 May 1979 the Magistrate committed the 1st and 2nd accused for trial to the High Court on a charge of murder under s. 302 of the Penal Code.

On the date of the incident the 3rd accused, Khoo Kean Teik was only 16 years 1 month old. He was arrested on 11 January 1980. A Preliminary Inquiry was initiated against him on 17 March 1980 and concluded on 13 July 1980. During that process he was produced in Court 6 times.

There were a couple of adjournments for medical reasons but at the conclusion of this Preliminary Inquiry he too was committed to stand trial for murder in the High Court.

The 4th accused, Tham Keen Yew was 21 years 6 months old on the date of the incident. He was arrested on 19 July 1980. After production in Court on 27 July 1980 a Preliminary Inquiry against him began on 29 September 1980. It was concluded on 22 February 1981. Between the two dates he was produced in Court 5 times. By then witnesses had already begun to become inavailable and this contributed to some further delay.

Unfortunately the Judge before whom the trial was to be initially heard passed away in 1982 and the date of the trial in the High Court was fixed for 2 April 1983.

On that date the charge against all the 4 accused was amended from one of murder under s. 302 to one of causing death under s. 304 in furtherance of the common intention of all 4 accused together with others still at large. The cases were consolidated, the accused claimed trial to the amended charge and the case was fixed for continuation in October 1983.

I have set out this history at some length because I feel that some explanation is owed to all concerned as to why this case has gone on for so long.

Whilst delays may occur in the administration of justice for a variety of reasons some of which may well be beyond human control I feel obliged to state that the time may well have come when Courts may have to reexamine whether it is a valid ground for postponement of a case merely because Counsel is engaged elsewhere. Admittedly accused persons have a right to be defended by Counsel of their choice. On the other hand it may be that it is now time for us to place a caveat on this indulgence to the effect that Counsel of choice must be Counsel who is available.

Towards the end of the year 1982 the prosecution felt that it would be in the best interests of justice if probation reports were obtained in respect of all 4 accused. Accordingly action was initiated in this direction and on 2 November 1982, 4 probation officers from the Social Welfare Department Johore Bahru each put a report on each of the accused.

In addition to containing the most useful information as to the character, antecedents, age, health and mental condition of the accused, they also contain references to various misdemeanours committed while the accused was still in school, alleged gambling activities, secret societies connection, and in one case a suggestion of drug addiction.

When the case came on for trial on 2 October 1983, the 1st, 2nd and 4th accused pleaded guilty to the amended charge. After the brief facts were read out and admitted by these accused, the learned DPP, relying on *Tukiran v. Public Prosecutor* [1955] MLJ 24, and *Teh Yew Whatt v. Public Prosecutor* [1958] MLJ 171, submitted to the Court that the probation reports relating to the 3 accused should be tendered in evidence through the probation officers who made them.

Because defence Counsel had not seen these reports earlier, I adjourned the case for them to be given an opportunity to take instruction on these documents.

The 3rd accused claimed trial initially. After the adjournment he too pleaded guilty.

The facts, to the extent that they were qualified by this plea of guilt, were once again put to all the 4 accused and the 3rd accused was also given an opportunity to consult with his Counsel on the contents of the probation report made of him.

Each of the probation officers then gave evidence and in the course of the cross-examination of these probation officers it became quite apparent that there were portions of the probation officers' reports which were disputed by the accused persons. In some instances the difference was purely a matter of degree. In others there was a total denial of what was alleged. In one instance there was even a suggestion of possible fabrication but this allegation was later qualified by Counsel concerned who, when it was pointed out that there may have been semantic difficulties in communication between the probation officer and the accused person, made it clear that want of integrity was not being imputed to the probation officer concerned but there was a possibility of a mistake.

The dispute which arose with regard to the probation reports made it incumbent upon the Court to inquire into what was properly the subject matter of a probation report.

The learned DPP and Counsel for the defence were therefore invited to address the Court on this aspect of the matter but unfortunately Counsel were not able to carry this matter beyond the passages referred to them by the Court which are contained in **Archbold's Criminal Pleading Evidence & Practice** 36th Edition para 613 and 614 and the cases therein cited particularly the case of *Maureen Perle Van Pelz* [1942] 19 CAR 10 and *Albert Bright* [1916] 12 CAR page 69.

Once an accused person has pleaded guilty, the extent to which he was likely to be prejudiced by adverse statements contained either in the brief facts submitted by the prosecution or in the probation reports tendered may become a contentious issue. To what extent does the accused have a right to challenge these statements? In the last resort is the Court obliged to hold a further trial to determine the credibility of these statements if they are disputed?

So far as the passage in para 614 in **Archbold** was concerned and the case of *Maureen Perle Van Pelz*, the submission could only be that if the prosecution, in the brief facts which it supplied to assist the Court on sentence, should only inform the Court of matters which they believe known by the Court, then it should follow that a probation officer cannot really have any greater licence. If a police witness giving evidence after conviction is not allowed to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner, then how can it be contended that a probation officer has any greater latitude.

The permissible limits when it comes to making adverse remarks against the accused who has pleaded guilty, appears to have been almost exhaustively treated in the extract from the case of *Choo Wai Sung v. Public Prosecutor* [1946] MLJ 119 and the unreported case of *Yap Tan Lim v. Rex* which are set out at some length in [1947] 13 MLJ page xvii where Sproule J. said:-

> The Court is entitled to such assistance from the prosecution. The prosecution should state all it knows, believes or can honestly argue or plead in favour of the accused. Nothing should be alleged by the prosecution against the interest of the accused which cannot be substantiated. If there is any suspicion against the accused which the prosecution believes may be proved after investigation, a postponement should be asked for without the suspicion being enunciated. No matter of suspicion against the accused should be enunciated, only matter of known fact or of arguments arising out of proved facts. Every matter of fact or argument so adduced against the accused must be explained to the accused. The accused must be given an opportunity

> of meeting argument with argument. The accused must be given an opportunity of admitting or challenging any new fact so alleged against him. If the accused challenges any such fact, the prosecution may withdraw its allegation, which the Court must then hold to be baseless. If the prosecution takes up the accused's challenge, then the issue should be tried and decided according to the rules of evidence and procedure provided by law, after postponement in favour of either side, if necessary, any reasonable doubt moreover being always solved in favour of the accused.

On the material made available to me I am unable to appreciate why the evidence of a probation officer be it verbal or in the form of a report should be treated any differently from the evidence of any other prosecution witness who is called upon to testify to matters relevant to the issues before the Court.

Therefore if any portion of the probation officer's evidence is challenged it will become incumbent upon the Court to take a position on the credibility of that evidence.

In the case before me I have already observed that the probation officers who gave evidence before me had carried out their duties with sensitivity and dedication. Counsel were unable to assist the Court in determining whether there were any statutory guidelines as to what a probation report should contain. But the reports which were put in for each of the accused do show that they must have been the product of experience in this area which has gone back for some generations. Each of the reports gave useful details of the background of the parents, the composition of the family, the domestic environment, the financial circumstances, the specific background of the accused person in terms of mental health, schooling, employment, social environment, and hobbies, and other general details. The assessment of the probation officer was also included.

These details are usually included in the reports of probation officers even in other countries where there is a statutory form. Thus in Singapore the Probation Offenders Act Cap. 117, the Probation Offenders Rules 1971 particularly r. 25(1) and the Form P.O. 1 specified thereunder requires these very details to be set out in the report.

In the circumstances it would appear that what the probation officers did in the case before me is fully in accordance with the normal practice.

The passages in **Archbold** to which reference has already been made also demonstrates that the conduct of the learned DPP in putting in the probation reports in the manner that he did was in accordance with the requirements of justice.

All the defence Counsel did indicate that their clients were substantially in agreement with whatever had been stated in the probation reports. They did also submit that as for the disputed portions, the Court should ignore the same in considering sentence. With this submission I agree. Accordingly I would state it for the record that I shall not allow myself to be influenced in any way by those parts of the probation reports which the accused persons have challenged since in all the circumstances of this case it will be unsafe to have regard to them.

I now proceed to deliver the judgment of the Court on the sentence to be imposed on each of the accused.

Mr. Karpal Singh cited the case of *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134 at 137 as authority for the proposition that a plea of guilty should be treated as a mitigating factor. He also relied on the case of *Malvani v. Public Prosecutor* [1971] 1 MLJ 137 to the

same effect. It was stated that even though the 1st accused had taken the most active part in this killing, he was only 16 years 10 months at the time of the incident. He had taken the bearing scraper with him to the scene for self-defence and whatever he did was in a spirit of youthful bravado. It was further submitted that he was a first offender and that he had already been incarcerated for slightly over 6 years.

The maximum sentence was 10 years and in view of his youth it was said that the 6 years he had already spent in custody was enough punishment.

The learned DPP, however, pressed for a deterrent sentence. In this context I think it relevant to refer to the statements made by Eusoffe Abdoolcader J. in *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186 at 188 where he said that:-

> It must be made abundantly clear that in the light of the appalling increase in crimes involving violence and the unlawful possession and use of lethal weapons, society is crying out, 'Enough is enough' and is no longer in any mood to tolerate such offenders.

That pronouncement was made a year before this killing took place. The statements were repeated by Chan J. in *Public Prosecutor v. Chung Kwong Huah* [1981] 1 MLJ 316 and I respectfully agree with them.

As set out in the brief facts adduced by the learned DPP as 1st accused together with about 12 persons including the other 3 accused attacked the deceased pursuant to a pre-arranged plan. I reject the suggestion that the 1st accused carried the bearing scraper for self-defence. 12 persons do not attack one unarmed person in self defence and inflict lethal injuries on him. It will be recollected that the deceased had 4 puncture wounds 2 of which proved fatal.

On the other hand I am prepared to make some concession that in view of the very young age of the 1st accused at the time of the incident he was in all probability misled by the older people who undoubtedly controlled the activities of the Seow Koon Tong Secret Society to which the 1st accused belonged.

Bearing in mind all the information and circumstances relevant to the 1st accused I sentence him to imprisonment for a period of 7 years. The sentence will commence from the date of his arrest on 11 September 1977.

In so far as the 2nd accused is concerned he was 21 years old at the time of the offence. It was submitted that he had come from troubled domestic circumstances and that he unwittingly got involved in the fight after an exchange of views between the deceased and the others. The plea of guilt and the fact that he was a first offender were stressed, and the fact that he attacked the deceased only with his bare hands.

Mr. Elyas Majeed who also acted for the 4th accused submitted that he too was only aged about 21 at the time of the incident. He had no previous bad record and all the factors which were urged on behalf of the 2nd accused applied equally to the 4th.

It was pointed out further that the 2nd accused had been in custody from his arrest on 7 January 1978 and that the 4th accused had been in custody since the date of his arrest 19 July 1980.

Mr. Subra Naicker for the 3rd accused adopted the submissions made by the other Counsel and added that the Court should refer to the case of *Lim Yoon Fah v. PP* [1971] 1 MLJ at 37 where Chang Min Tat J. quoted with approval the remarks of Hillbury J in *R. v. Ball.* Great stress was placed upon the fact that the 3rd accused was just over 16 years at the

time of the offence and that little else could be said against him except that he was a pampered child. He was not a member of any Secret Society and got involved in the fight in which he was not armed.

I have given the most earnest consideration to everything that had been urged by these 3 accused. In the best interest of justice the Court now passes a sentence of 6 years for the 2nd accused, 5 years for the 3rd accused and 6 years for the 4th accused each of these sentences to commence from the date of arrest.

Also found at [1984] 1 CLJ 193